In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-1116

SENATOR H. L. RICHARDSON, et al.,
Petitioners,

VS.

BOB LOKEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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The petitioners, Senator H. L. Richardson, et al., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 9, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears as Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on December 9, 1975. This petition for certiorari was filed within 90 days after that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Due Process Clause applies and, if so, requires state prison officials to afford an inmate serving a life sentence without possibility of parole, notice, opportunity to be heard, and a statement of reasons before determining, for security reasons, that the inmate may no longer be permitted outside the security fence of the institution.[1]

2. Whether principles of nonretroactivity bar a state prisoner's claim that in December of 1972 he was entitled to notice, opportunity to be heard, and statement of reasons prior to prison officials' determination that he may no longer be permitted outside the security fence of the institution.

3. Whether the federal courts have jurisdiction, under the Civil Rights Act, to entertain complaints by state inmates attacking the degree of their custody classification.

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[1]Similar issues are now before this Court in *Meachum v. Fano*, No. 75-252, *cert. granted* 44 U.S.L.Wk. (U.S. Dec. 9, 1975), and *Montanye v. Haymes*, No. 74-520 (*cert. granted* 43 U.S.L.Wk. 3683 (U.S. June 24, 1975)).

STATEMENT OF THE CASE

On April 11, 1973, Bob Lokey, on behalf of himself, Charlene Lokey, Bobbi Lokey and Jerri Lokey, filed a complaint for injunctive relief and damages in the United States District Court for the Northern District of California. The complaint alleged violations of their civil rights under Title 42 of the United States Code sections 1983, 1985 and 1988. On June 12, 1973, petitioners filed a motion to dismiss and in the alternative for summary judgment. On July 13, 1973, and October 2, 1973, respondents filed oppositions to the latter motion. On December 4, 1973, the District Court granted petitioners' motion for summary judgment. This order appears as Appendix B to this petition. Respondent Bob Lokey appealed this decision,[2] and on April 16, 1975, the United States Court of Appeals for the Ninth Circuit issued its opinion reversing and remanding the matter for further proceedings. This opinion appears as Appendix C to this petition. On April 30, 1975, petitioners filed a petition for rehearing and suggestion for rehearing en banc. On December 9, 1975, the Court of Appeals issued a second opinion in this matter (Appendix A). The court ordered its opinion of April 16, 1975, withdrawn, but again reversed the District Court's order and remanded the matter for further proceedings. On January 6, 1976, the Court of Appeals granted petitioners' application of December 23, 1975, for a stay

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[2]On July 13, 1975, in his amended opening brief on appeal respondent advised the court that the other named plaintiffs Charlene Lokey, Bobbi Lokey and Jerri Lokey were abandoning their claims for damages and not appealing the District Court's order.

of mandate until January 8, 1976. On January 12, 1976, the Court of Appeals granted petitioners' motion of January 8, 1976, for an extension of stay of mandate until February 7, 1976.

STATEMENT OF FACTS[3]

On November 2, 1972, the Chief Deputy Director of the California Department of Corrections advised all penal institutions within the State that effective the latter date ". . . no inmate serving life without possibility of parole is to be classified minimum custody without prior review and concurrence by the Departmental Review Board." This change in policy was prompted by the necessity for custody reclassifications following court decisions holding the death penalty unconstitutional and the escape by an inmate serving a life sentence without possibility of parole.

On the above date, respondent was confined at San Quentin Prison and serving a life sentence without possibility of parole as a result of his plea of guilty to violation of California Penal Code sections 187 (first degree murder) and 209 (kidnaping for the purpose of robbery with bodily harm). *See In re Lokey*, 64 Cal.2d 626, 51 Cal. Rptr. 266 (1966). At this time respondent had been in a minimum custody

[3]Most of the complaint and the proceedings in the District Court related to respondent's claim that various California officials conspired to prevent commutation of his sentence from life without possibility of parole to life with possibility of parole. See Appendix A. Ninth Circuit Opinion, p. ii, n.1. However, respondent did not appeal the granting of petitioners' motion for summary judgment as to this issue.

classification for a period of 2½ years, was permitted to travel outside the prison accompanied only by an unarmed security guard, was second in command of the San Quentin firehouse located outside the prison and which served surrounding communities as well as the institution, and was permitted outside the prison to take part in the overnight family visiting program.

Upon receiving the above memorandum, the San Quentin staff referred respondent's case to the Departmental Review Board as required. On December 15, 1972, the Board made a detailed review of respondent's case and ruled that he was not approved for assignment outside the security fence area. Thereafter respondent was confined to areas within the security fence.

REASONS FOR GRANTING THE WRIT

Petitioners seek the review of this Court because the Ninth Circuit's opinion raises serious constitutional issues dramatically affecting the role of the federal courts in the administration of state penal institutions. Petitioners' complaint is not one of the fact of federal jurisdiction in such matters nor do we suggest that there be any sacrifice of constitutional rights on the altar of institutional efficiency. Our grievance is addressed to the alarming increase in federal litigation generated by state convicts as a result of what appears to be the ever-intensifying and unnecessary extension of federal review into the day-to-day operations of state prisons.

In this case, by holding that even a purely classification matter affecting merely an inmate's privileges is subject to federal review, the Ninth Circuit has, in effect, extended federal jurisdiction to the very essence of the prison administration processes. The parameters of such jurisdiction have the potential to encompass literally every decision made by prison officials. Such an extension is not only unwarranted, it is simply not constitutionally compelled.

It is not the function of the federal judiciary to operate state prisons and it does not behoove the federal judiciary to entertain the kind of litigation which inevitably ensnares the federal courts ever deeper into that bottomless and perplexing morass of sociological problems intrinsic to penological administration—absent a clear and compelling federal interest.

It is the very nature of the latter interest which is of concern here. While we seek no limitation thereon, we do query its existence and extent, for only with an accurate comprehension thereof can there be a true understanding of the federal judiciary's role in its vindication.

A convicted murderer and kidnaper serving a life sentence without possibility of parole does not have a constitutional right to a particular custody classification or to be permitted outside the prison walls—whether it be for overnight visits with his family or to operate a fire station. By the same token, he cannot acquire a constitutional right to these privileges merely by having taken advantage of past decisions by prison officials to bestow them upon him.

Yet, the Ninth Circuit's opinion recognizes a constitutionally guaranteed "liberty" interest in a certain custody classification and in certain privileges attendant thereto, despite the fact California has never created such an interest—an elementary prerequisite to federal due process jurisdiction recognized by this Court in *Wolff v. McDonnell,* 418 U.S. 539, 556-558 (1974). The Ninth Circuit's opinion recognizes a constitutionally protected "liberty" interest in a nondisciplinary occasioned loss of privileges despite the fact this Court stated in *Wolff v. McDonnell, supra,* that such a "loss of privileges" was not actionable. The Ninth Circuit's opinion extends federal jurisdiction in such matters retroactively despite this Court's holding in *Wolff v. McDonnell, supra,* that these due process guarantees apply only prospectively. And, even assuming, *arguendo,* that a "liberty" interest does exist in prison classification proceedings, the remedy is not suit under the Civil Rights Act—it is habeas corpus.

This Court must resolve these conflicts. If it does not, every decision made by prison officials, be it a matter of classification or simply administrative, will be an express invitation for immediate federal review and correctional officials will be spending more time in federal courts defending themselves from litigious prisoners in civil rights actions than in administering the prisons.

ARGUMENT

I

A PERSON COMMITTED TO A CALIFORNIA STATE PRISON UPON HIS CONVICTION OF A CRIME HAS NO LIBERTY OR PROPERTY INTEREST IN ANY PARTICULAR CUSTODY CLASSIFICATION OR THE PRIVILEGES WHICH MAY BE ATTENDANT THERETO

A. The Liberty interest question.

The Constitution does not require that every government impairment of some interest be conditioned on notice and an opportunity to be heard. *See Cafeteria Workers v. McElroy,* 367 U.S. 886, 894 (1961).

> "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. (Footnote omitted.) But the range of interests protected by procedural due process is not infinite." *Board of Regents v. Roth,* 408 U.S. 564, 569-570 (1972).

As further observed by this Court in *Roth,*

> "[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interests at stake. *See Morrissey v. Brewer, ante,* at 481. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth, supra,* 408 U.S. 564, 571 (1972).

The concept of liberty has been broadly construed so as to encompass not only freedom from physical restraint, but also the freedom to pursue and enjoy

those privileges long accorded to free men. *Board of Regents v. Roth, supra,* 408 U.S. 564, 572 (1972). As a consequence of having been convicted of a crime and of having been committed to state prison, an inmate is necessarily subject to physical restraint and his activities are delineated by his custodians. *See Preiser v. Rodriguez,* 411 U.S. 475, 491-492 (1973). In short, by virtue of his status, an inmate does not have a liberty interest in any particular custody classification within a state prison. It is further submitted that one classification as opposed to another cannot be equated with the conditional grant of "many of the core values of unqualified liberty. . . ." *Morissey v. Brewer,* 408 U.S. 471, 482 (1972).

However, where the State, although not constitutionally compelled to do so, statutorily creates a substantive right such as Nebraska did with respect to good time credits, to insure that this state created right is not arbitrarily abrogated minimum procedures required by the due process clause must be implemented. *Wolff v. McDonnell, supra,* 418 U.S. 539, 557. Accordingly, if California had statutorily created in respondent a right to a certain custody classification and to the privileges associated therewith, there may have existed a liberty interest in their retention. However, California has simply not created such rights or interests. Custody classifications and privileges are matters wholly entrusted to the sound judgment of California's prison officials. In fact, in this case the November 2, 1972, revision of the Classification Manual expressly precluded respondent's being classified

minimum custody without Department Review Board approval—an entirely discretionary matter. Thus, it is submitted respondent had no "liberty interest" entitled to constitutional protection.[4]

A second distinction also compels the latter conclusion. Although in *Wolff v. McDonnell, supra,* this Court afforded due process in *disciplinary* proceedings effecting a "major change in the conditions of confinement" resulting from a "major act of misconduct," this Court refused to require due process proceedings *"for the imposition of lesser penalties such as the loss of privileges." Wolff v. McDonnell, supra,* 418 U.S. 539, 571, n. 19. (Emphasis added.) In the instant matter, it is just such a loss of privileges which is the basis for respondent's complaint. Moreover, they were withdrawn as a matter of administrative reclassification for reasons related to prison security. Yet, the Ninth Circuit holds these distinctions to be of absolutely no consequence.

If the Ninth Circuit's opinion is allowed to stand any inmate with a modicum of imagination can and will, merely by composing a list of all the infinitely diverse changes in conditions of confinement inherent in and routine to the everyday operation and administration of any given institution, create a compilation of alleged infringements which, by their usual illusory addition, will appear to constitute that mag-

[4]Since the filing of the complaint in this case, the California Department of Corrections has implemented specific procedural safeguards where decisions are made increasing an inmate's custody level. *See* our amicus brief in *Montanye v. Haymes,* No. 74-520, Appendix A.

ical jurisdictional sum known as the "grievous loss." However, such fallacious arithmetical machinations cannot be allowed to so easily camouflage the real issue. The creation of federal jurisdiction cannot be permitted on a "bottom line" basis for it is not the *weight* of the interests lost but whether the *nature* of those interests are entitled to constitutional protection. *Board of Regents v. Roth, supra,* 408 U.S. 564, 569-570. Yet, it is precisely the eradication of the latter distinction which the Ninth Circuit's opinion in this matter achieves.

B. The property interest question.

As further observed by this Court,

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . . [¶] Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules of understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth, supra,* 408 U.S. 564, 577, *see Wolff v. McDonnell, supra,* 418 U.S. 539, 557 (1974).

Accordingly, an inmate can also have no property interest to a particular custody classification or to certain privileges unless state law grants him an entitlement to those amenities. California's statutory

scheme is premised upon the maintenance of a variety of institutions (*see* Cal. Pen. Code §5003), grants correctional officials the authority to classify inmates and determine the institution in which the person is to be confined (*see* Cal. Pen. Code §5068), and the authority to transfer a person from one institution to another (*see* Cal. Pen. Code § 5080). California law thus precludes the establishment of a property interest in any particular custody classification just as it precludes the right to be confined in any particular institution.

Accordingly, an inmate who is merely transferred from outside the security fence of an institution to inside the institution is not deprived of liberty or property protected by the Fourteenth Amendment.

II

THE NINTH CIRCUIT'S OPINION CONFLICTS WITH OTHER OPINIONS FROM THAT CIRCUIT AND WITH THOSE OF THIS COURT, BECAUSE, ASSUMING A LIBERTY INTEREST THEN EXISTED, IT APPLIED DUE PROCESS HEARING REQUIREMENTS TO A 1972 DEPRIVATION

If the Ninth Circuit's decision is allowed to stand not only will it constitute an unwarranted enlargement of the liberty interest protected by the Due Process Clause, but it is equally disturbing because it extends federal review well into that period in time which this Court held was precluded by principles of nonretroactivity. Despite the clear holding of this Court on June 24, 1974, that due process guarantees apply prospectively to an inmate's loss of liberty claim

and then only to the discipline of inmates for major infractions and which measures occasion a loss of benefits guaranteed that inmate by state law, the Ninth Circuit holds in 1975 that nondisciplinary action by prison officials in 1972, terminating privileges of an inmate not guaranteed him by any state law, states a cause of action in the federal courts for damages and injunctive relief under the Civil Rights Act.

In the opinion of April 16, 1975 (Appendix C), the Ninth Circuit held reversal was required under *Clutchette v. Procunier,* 497 F.2d 809 (9th Cir. 1974), *modified on rehearing,* 510 F.2d 613 (1975), *cert. granted,* 401 U.S. 1010, and *Wolff v. McDonnell, supra.* In our petition for rehearing and suggestion for rehearing en banc, petitioners pointed out that *Wolff v. McDonnell, supra,* was not retroactive and that the Ninth Circuit, in *Wheeler v. Procunier,* 508 F.2d 888 (9th Cir. 1974), had held that *Clutchette v. Procunier, supra,* was not retroactive. *Wheeler v. Procunier, supra,* involved the 1971 transfer of a San Quentin inmate from the general prison population to punitive segregation. It therefore appeared that respondent's claim that in 1972 he was entitled to a due process hearing when correctional officials transferred him from outside to inside the prison walls was barred under *Wheeler v. Procunier, supra,* and *Wolff v. McDonnell, supra.*

The Ninth Circuit responded by withdrawing the April 16, 1975 opinion and holding that *Wheeler v. Procunier, supra,* and *Wolff v. McDonnell, supra,* were distinguishable because this case was an "exten-

sion of the rule in *Wolff* from disciplinary to administrative classification proceedings" and therefore "presents substantial new issues as to whether a 'liberty' interest is involved. . . ." Appendix A, p. ix, n.6. However, this distinction is pure sophistry. The Ninth Circuit, in this very same opinion, held that there is no distinction for due process purposes between "administrative" and "disciplinary" proceedings, and between "privileges" and "rights" (*Id.* p. vi), and this holding compels the conclusion that relief is barred by both *Wheeler v. Procunier, supra,* and *Wolff v. McDonnell, supra,* the issue being solely one of the time at which the alleged change in conditions occurred.

III

THE FEDERAL COURTS DO NOT HAVE JURISDICTION UNDER THE CIVIL RIGHTS ACT TO ENTERTAIN RESPONDENT'S CLAIM THAT HE IS UNLAWFULLY CONFINED WITHIN THE SECURITY FENCE BECAUSE THAT RELIEF MAY BE OBTAINED ONLY BY A PETITION FOR HABEAS CORPUS

The only issue before the Ninth Circuit was whether summary judgment was proper on respondent's claim that the decision to no longer permit him outside the security fence was unlawful because arrived at without procedural due process. Although respondent sought damages because of his alleged unlawful confinement within the security fence, the main thrust of his present complaint is for injunctive relief returning him to his earlier custody status and participation in those activities outside the security fence from

which he had been removed, such as the overnight family visiting program. Respondent does not attack the conditions of his present confinement—only the location of that confinement. He has not sought to enjoin any State statute, regulation, procedure, or policy. His complaint is a personal one, directed at specific actions taken by certain individuals at a particular time, and related solely to obtaining a lesser degree of custody. He has not alleged any prior attempts to seek redress of his grievances in the State courts.

Analytically, therefore, and but for the damages claim, respondent is in a posture no different than any other individual who has allegedly been confined to a certain custody without due process. *See, e.g., Morissey v. Brewer, supra; Jones v. Cunningham,* 371 U.S. 236 (1962); *Johnson v. Avery,* 393 U.S. 483 (1969). In form, his complaint is not dissimilar from that of the plaintiff in *Preiser v. Rodriguez,* 411 U.S. 475 (1973), who improperly challenged, under the Civil Rights Act, the fact of his confinement based upon the "alleged unconstitutionality of state administrative action." 411 U.S. 475, 489. Such complaints, because they relate particularly to the fact or duration or location of confinement by the State, raise issues which the State is not only far better suited to dispose of but is legally entitled, as a matter of comity, to remedy in the first instance. *Preiser v. Rodriguez, supra,* 411 U.S. 475, 489-492. Thus,

> ". . . when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate or speedier re-

lease from that imprisonment, *his sole federal remedy is a writ of habeas corpus." Preiser v. Rodriguez, supra,* 411 U.S. 475, 500. (Emphasis added.)

The fact respondent has inserted a claim for damages in his complaint, although altering its form, should not be permitted to disguise its true substance and permit him to escape the exclusivity of federal habeas corpus relief and its concomitant exhaustion requirements.[5] *Preiser v. Rodriguez, supra,* 411 U.S. 475, 488-494. A claim for damages may only be entertained if the suit is otherwise "properly brought under § 1983," as where the plaintiff challenges the conditions of his confinement rather than the fact or length of custody. *Wolff v. McDonnell, supra,* 418 U.S. 539, 554. But,

> "If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release—the traditional purposes of habeas corpus." *Preiser v. Rodriguez, supra,* 411 U.S. 475, 494.

---

[5]Respondent's damages claim was utterly without a legal basis. In addition to the State of California, the named defendants were the Director of the California Department of Corrections, the Warden of San Quentin Prison, members of the California Adult Authority, and California State Senator H. L. Richardson. The State of California is clearly not a proper party defendant in a civil rights suit and all of the individual defendants were State officials exercising discretionary judgments within the scope of their official duties. They were therefore immune from suit. No members of the Departmental Review Board which denied respondent approval for assignment outside the security fence were named as defendants. Accordingly, summary judgment as to the damages claim was entirely proper.

Accordingly, because the substance of respondent's claim is return to a lesser degree of custody for which his exclusive remedy is federal habeas corpus, it is submitted that federal jurisdiction under the Civil Rights Act does not exist to return him to that custody classification.

CONCLUSION

For the aforementioned reasons, petitioners respectfully request this Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review and reverse the decision in this case.

Dated: January 30, 1976.

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(Appendices Follow)

APPENDICES

Appendix A

CORRECTED OPINION

Opinion of April 16, 1975 is withdrawn by Order of 12/9/75

United States Court of Appeals
for the Ninth Circuit

No. 74-1256

Bob Lokey, et al.,	Plaintiffs-Appellants,
vs.	
H. L. Richardson, etc., et al.,	Defendants-Appellees.

[December 9, 1975]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: BROWNING and ELY, Circuit Judges,
and ANDERSON,* District Judge

BROWNING, Circuit Judge:

Appellant Lokey, a state prisoner confined in San Quentin serving a life sentence without possibility of parole, appeals the order of the district court granting

*Honorable J. Blaine Anderson, United States District Judge, District of Idaho, sitting by designation.

summary judgment in favor of appellees in appellant's suit under the Civil Rights Act, 42 U.S.C. § 1983. The only issue before this court is whether summary judgment was proper on appellant's claim that the decision of the California Department of Corrections to rescind his minimum custody classification was made without procedural due process.[1]

Appellant's uncontroverted allegations depict him as a model prisoner who had achieved a minimum security status accorded few convicts. He entered the prison with a sixth-grade level education. While in custody he completed both high school and two years of college, receiving an associate in arts degree with honors. In addition, he completed a two-year course in office machine technology, graduating at the top of the class, and a two-year institutional course in "creative dynamics." During his imprisonment he read widely in the field of human physiology and anatomy, and in the behavioral sciences. He became an accomplished artist. He invented an improved Braille typewriter and a variety of tools, including a safety power saw, and organized a corporation to manufacture and market his innovations. An institutional report states, "Mr. Lokey is described by custody officials as maintaining excellent standards within the institutional setting, especially since 1964. Everyone that he comes in con-

[1]Appellant also alleged that various California officials conspired to prevent commutation of appellant's sentence from life without possibility of parole to life with possibility of parole. Most of the proceedings below related to this issue. Appellant has restricted this appeal to the issue stated in the text. Other appellants are Mr. Lokey's wife and two minor children. The appellants appear *pro se*.

tact with speaks highly of him and he is a trusted individual working in a minimum s tting who received work grades from above average to exceptional." Because of his exemplary conduct appellant was given a minimum custody classification enjoyed by only 20 or 30 inmates of San Quentin. He was permitted to travel to points distant from the prison accompanied only by an unarmed security guard. He was second in command at the San Quentin firehouse, located outside the prison walls, serving surrounding communities as well as the institution. Most important, appellant's minimum security classification entitled him to participate in the Family Visiting Program, under which he was permitted to be with his wife and two children at overnight family visiting facilities outside the prison.

After two and a half years, appellant's minimum security status was abruptly terminated. He received no notice of the proposed change of status, and no hearing. He was given no reason for the reclassification, orally or in writing.[2] The revocation of his minimum security classification terminated the various privileges referred to, including appellant's participation in the family visitation program.

Appellees filed three documents in support of their motion for summary judgment. The first is an internal memorandum dated November 2, 1972, from the Chief Deputy Director of the State Department of Corrections, to Classification and Parole Representatives. It reads:

[2]*See* note 3 *infra*.

> Effective this date, and pending revision of Chapter VI of the Classification Manual, no inmate serving life without possibility of parole is to be classified minimum custody without prior review and concurrence by the Departmental Review Board. Any cases now so classified should be submitted to the Departmental Review Board for their review and action.

The second document submitted by appellees is an interoffice memorandum dated December 15, 1972, from the Chief of Classification Services to the Chief Deputy Director. It reads:

> REASON FOR REFERRAL
>
> Subject referred to [Departmental Review Board] by San Quentin staff as a result of the Director's policy regarding minimum custody classification for inmates serving Life Without Possibility of Parole.
>
> [DEPARTMENTAL REVIEW BOARD] ACTION
>
> [Departmental Review Board] met on December 15, 1972. Following a detailed review of all case factors Lokey *not* approved for assignment outside security fence area.

The third document submitted by appellees is a page from the State Classification Manual, containing a revision reading: "Inmates serving life without possibility of parole are not to be classified minimum custody without prior review and concurrence by the Departmental Review Board."

A fourth document is attached to appellant's opposition to the motion for summary judgment. It is

a letter date April 24, 1973, from the Director of Corrections, Appellee Procunier, to appellant. The portion of the letter relating to termination of appellant's minimum custody status reads as follows:

> If you recall, the abolishment of the death penalty required the movement of many people with serious offenses and received much public attention. Shortly after that, a person having a Life Without Possibility of Parole sentence escaped from one of our institutions. The combination of issues demanded a removal of such cases from minimum assignments. A Classification Manual change has been made to make this a general order which was made flexible to permit meritorious cases minimum assignments by order of the Departmental Review Board only. Your case was presented to the Departmental Review Board on December 15, 1972 for that consideration; however, the manner [in which] you have handled the disappointment clearly indicates at this point that the decision to bring you inside the security area was a proper one.[3]
>
> I can understand the feeling you have expressed and the disadvantages you have received. Unfortunately, the order regarding the minimum assignments was made to change a condition involving many people, and therefore must stand.

---

[3]Appellee Procunier's reference to "the manner [in which appellant] handled the disappointment" does not appear to be a statement of the reason for the termination of appellant's minimal security status. As the record document referred to in the text reflects, appellant's minimum security status was terminated December 15, 1972. Appellee Procunier, writing on April 24, 1973, states that appellant's reaction indicates "at this point" that the earlier termination decision was proper. Perhaps the reference was to the filing of the present suit on March 31, 1973, less than a month before Appellee Procunier wrote.

Appellees contend that these documents demonstrate that termination of appellant's minimal security status was a "purely administrative and nondisciplinary decision regarding the security of the institution," and resulted in the loss only of a "privilege." They argue that such a decision imposing such a loss does not require the procedural due process mandated by *Wolff v. McDonnell,* 418 U.S. 539 (1974), for disciplinary proceedings resulting in loss of good-time credit.

Summary judgment on this ground was not proper. Appellees were not entitled to judgment "as a matter of law," Federal Rule of Civil Procedure 56(c), on the few uncontroverted facts reflected in this skimpy record.

The right to procedural due process turns upon whether there is an infringement of "liberty" *(Morrissey v. Brewer,* 408 U.S. 471, 481 (1972)), not upon whether the deprivation is characterized as "administrative" rather than "disciplinary," or involves loss of a "privilege" rather than a "right." *Clutchette v. Procunier,* 510 F.2d 613, 615 (9th Cir. 1975).

Appellant alleges that termination of his minimal security status deprived him of highly significant privileges (including a familial relationship, especially protected by the law, *Stanley v. Illinois,* 405 U.S. 645, 651 (1972)), and worsened the conditions of his imprisonment in a most serious and substantial way. Such losses could be imposed as punishment only by due process of law. *Clutchette v. Procunier, supra.* They constitute no less a loss of "liberty" protected by the due process clause when imposed for "administrative' reasons. *See, e.g., Cardaropoli v. Norton,* ..... F.2d ....., ... (2d Cir. 1975); *Urbano v. McCorkle,* 334 F.Supp. 161, 168 (D. N.J. 1971), *aff'd mem.,* 481 F.2d 1400 (3d Cir. 1973); *Stone v. Egeler,* 377 F. Supp. 115, 118 (W.D. Mich. 1973), *aff'd as modified,* 506 F.2d 287 (6th Cir. 1974).

In *Cardaropoli,* the Second Circuit held that due process safeguards must be provided in the administrative classification of a newly admitted prisoner as a "Special Offender" or "Special Case." The Court of Appeals relied upon a district court finding that such a classification "delays or precludes social furloughs, release to halfway houses and transfers to other correctional institutions; in some cases, the characterization may bar early parole." ..... F.2d at ....., *citing Catalano v. United States,* 383 F.Supp. 346, 350 (D. Conn. 1974). The Court of Appeals concluded, "[T]he marked changes in the inmate's status which accompany the designation create a 'grievous loss,' *Morrissey v. Brewer, supra,* 408 U.S. at 481; *Goldberg v. Kelly,* 397 U.S. 254, 263 (1970); *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), and may not be imposed in the absence of basic elements of rudimentary due process." ..... F.2d at .....[4]

[4]Appellant's entitlement to due process does not face an obstacle successfully overcome in *Cardaropoli* by the Second Circuit (..... F.2d at ..... n. 11): Cardaropoli sought procedural protection in the initial classification process; appellant seeks protection against the withdrawal of a status he has long enjoyed. *See* Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1295-96 (1975).

Appellees argue, however, that the present case is controlled by prior decisions of this court holding that nonconsensual transfers of prisoners between institutions may be ordered without procedural protections. *Fajeriak v. McGinnis,* 493 F.2d 468 (9th Cir. 1974); *Hillen v. Director of Social Services & Housing,* 455 F.2d 510 (9th Cir.), *cert. denied,* 409 U.S. 989 (1972); *Duncan v. Madigan,* 278 F.2d 695 (9th Cir. 1960), *cert. denied,* 366 U.S. 919, 368 U.S. 905 (1961). The opinions in these cases do not indicate that the conditions of confinement of the transferees were substantially worsened by the transfers. As we recently noted, these cases hold only that nonconsensual transfers do not constitute a violation of due process standing alone. We added, "[H]owever we have also held that transfers to penalize prisoners for their religious beliefs [are] unconstitutional, *Fajeriak v. McGinnis,* 493 F.2d 468 (9th Cir. 1974), and have been careful to note that we reserve opinion upon any general procedural rule involving the due process implications of nonconsensual transfers." *Stinson v. Nelson,* ..... F.2d ....., ... (9th Cir. 1975). *See also Tai v. Thompson,* 387 F. Supp. 918, 914 (D. Hawaii 1975).

In concluding that the termination of appellant's minimal security status may have deprived him of "liberty" protected by the Due Process Clause, we have relied upon appellant's uncontradicted allegations as to the seriously adverse consequences flowing from the reclassification. This will be a matter of proof on remand.

If the court on remand concludes that a "liberty" interest is at stake, the court must then determine what procedural protections are appropriate, based upon a careful balancing of the interests of the prisoner and the state in light of the facts as they may be developed. *Peacock v. Board of Regents,* 510 F.2d 1324, 1327 (9th Cir. 1975).[5] It would also be advisable for the trial court to develop the facts relevant to whether the new procedural rules, if any, should be applied retroactively.[8]

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[5]A loss may be of such slight consequence to the inmate that it is entirely outweighed by the interest of the prison administrator in summary disposition. In such a case, few procedural formalities, or none, may be required. *See Wolff v. McDonnell,* 418 U.S. 539, 571-72 n. 19 (1974); Clutchette v. Procunier, 510 F.2d 613, 615 (9th Cir. 1975); *cf.* Cardaropoli v. Norton, ... F.2d ....., ... n. 12 (2d Cir. 1975).

[6]Appellees suggest that reversal is barred by the holding in Wolff v. McDonnell, 418 U.S. 539, 573-74 (1974), and Wheeler v. Procunier, 508 F.2d 888 (9th Cir. 1974), that the rule that due process safeguards are required in prison disciplinary proceedings is not to be applied retroactively. Appellees' suggestion necessarily assumes that this rule *does* apply to administrative classification proceedings, a position which appellees in fact vigorously reject.

The extension of the rule in *Wolff* from disciplinary to administrative classification proceedings presents substantial new issues as to whether a "liberty" interest is involved and, if so, what protections are appropriate to protect it. The latter issue, particularly, requires the balancing of quite different considerations, and may well result in quite different procedural requirements.

The present case is no more controlled by the nonretroactivity of the *Wolff* holding regarding due process requirements in disciplinary proceedings, than Gagnon v. Scarpelli, 411 U.S. 778 (1973) (involving due process requirements in proceedings to revoke probation) was controlled by the nonretroactivity of the holding in Morrissey v. Brewer, 408 U.S. 471 (1972) (involving due process requirements in proceedings to revoke parole). The procedural requirements announced in *Morrissey v. Brewer,* decided in 1972, were expressly applicable only "to future revocation of parole." Yet *Gagnon v. Scarpelli,* in extending the same procedural requirements to invalidate a revocation of probation that had occurred in 1965 (411 U.S. at 780), relied primarily upon *Morrissey v. Brewer:* "Petitioner does not contend there is any

For these purposes it is important to identify clearly the government action involved. Appellant does not challenge the administrative determination of the Department of Corrections announced in the Deputy Director's memorandum of November 2, 1972, that "[e]ffective this date, . . . no inmate serving life without possibility of parole is to be classified minimum custody without prior review and concurrence by the Departmental Review Board." Appellant contends only that he was entitled to due process in the decision to terminate his minimum security status pursuant to the statement in the second sentence of the Chief Deputy Director's memorandum that "[a]ny cases now so classified should be submitted to the Departmental Review Board for their review and action." Appellant contends only that he was entitled to due process in the decision to terminate his minimum security states pursuant to the statement in the second sentence of the Chief Deputy Director's memorandum that "[a]ny cases now so classified should be submitted to the Departmental Review Board for their review and action."

As Appellee Procunier pointed out in his letter of April 24, 1973, the adoption of the rule requiring prior Review Board concurrence in subsequent decisions to grant minimum security status to inmates serving a

difference between the revocation of parole and the revocation of probation, nor do we perceive one." 411 U.S. at 782.

Of course, principles derived from cases involving nonretroactive holdings are applicable to new areas, even if the events in the later cases arose before the decision embodying the nonretroactive holding. *Wolff* relied upon *Morrissey v. Brewer* and *Gagnon v. Scarpelli*, both nonretroactive.

life sentence without possibility of parole was a policy decision affecting many people based upon facts that did not pertain particularly to appellant. The new rule did not provide that the existing minimum security classifications of all such inmates was automatically revoked. On the contrary, it provided that such cases should be reviewed and acted upon individually. As noted, the new rule was effective November 2. The December 15 memorandum of the Chief of Classifications states that on that date the Board reviewed "all case factors" affecting appellant, and determined not to approve his assignment outside the security fence. The complaint alleges that appellant's minimum security status was terminated and he was confined within the prison on the same day. Appellant challenges only the procedures by which this determination of appellant's individual status was reached.

The significance of this fact is twofold. It is relevant to the procedural protections that may be appropriate; procedural devices affording an opportunity for effective participation in agency determinations are less rigorous when a rule of general application is being determined than when the issue at stake in the status under the rule of the particular individual who asserts the right to participate. K. Davis, Administrative Law Treatise §§ 7.01, 7.02, & 7.04 (1958 ed. and 1970 supp.); *see* Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1268 (1975). It is also relevant to the retroactivity of the procedural rules that may be adopted: the impact of retroactivity of such rules upon the integrity of the fact finding involved and upon the interests both of prison adminis-

trators and inmates may be quite different in the context of adjudication than in the context of rule making.

Reversed and remanded.[7]

[7] In view of the nature of the hearing that will be required on remand, the trial court may wish to consider the appointment of counsel to assist appellant in the presentation of his claim.

Appendix B

In the United States District Court
for the Northern District of California

Civil No. C-73-592 RFP

Bob Lokey, et al.,
Plaintiffs,
vs.
Senator H. L. Richardson, et al.,
Defendants.

[Filed December 4, 1973]

ORDER

This matter having been submitted to the Court for consideration and decision on the record and pleadings on file,

It is Hereby Ordered that the Motion by defendants' for Summary Judgment, is GRANTED.

Dated: December 3rd 1973

/s/ Robert F. Peckham,
United States District Judge

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Appendix C

United States Court of Appeals
for the Ninth Circuit

No. 74-1256

Bob Lokey, et al.,
Plaintiffs-Appellants,
vs.
H. L. Richardson, et al.,
Defendants-Appellees.

[April 16, 1975]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: BROWNING and ELY, Circuit Judges,
and ANDERSON,* District Judge

PER CURIAM:

Appellant Lokey, a state prisoner confined in San Quentin serving a life sentence without possibility of parole, appeals the Order of the district court granting summary judgment in favor of defendants. The only issue before this Court is whether summary judgment was proper on appellant's claim that the decision of the California Department of Corrections to rescind his minimum custody classification was made without procedural due process.

*Honorable J. Blaine Anderson, United States District Judge for the District of Idaho, sitting by designation.

In response to the decision of the California Supreme Court declaring the death penalty under California law unconstitutional in *People v. Anderson,* 6 C. 3rd 628, 493 P. 2d 880 (1972) and also in part prompted by the escape of an inmate who was serving a life sentence without possibility of parole, the Department of Corrections in November, 1972, advised all penal institutions within the state that no inmate serving a life sentence without possibility of parole could be classified minimum custody without prior review and concurrence of the departmental review board. In December of 1972 the review board considered appellant's case and decided to rescind his minimum custody status. Up to that time appellant had enjoyed minimum custody status for over two and one-half years and as one of the privileges of that status had the ability to be with his wife and two daughters at the overnight family visiting quarters on a monthly basis. Appellant was not afforded a hearing on the proposed reclassification. The revocation of minimum custody status automatically terminated appellant's participation in the family visitation program.

The panel is of the opinion that had the district judge had the benefit of this Court's decision in *Clutchette v. Procunier,* 497 F.2d 809 (9th Cir. 1974), opinion on rehearing, ... F.2d ..... (October 21, 1974) (hereinafter Clutchette II), and of the Supreme Court in *Wolff v. McDonald,* ..... U.S. ....., 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), the contrary result would have been reached. In *Clutchette II* this Court held that some process is due to prisoners whose priv-

ileges are to be revoked as a disciplinary measure, where such revocation amounts to a grievous loss. (Slip Opinion Pg. 2). The fact that Lokey's privileges were revoked as a result of a purely administrative, non-disciplinary decision, while in *Clutchette II* appellant's privileges were revoked as a disciplinary measure, is not a controlling distinction when considering whether due process attaches at all. The loss of appellant's ability to see and be with his family, a privilege previously granted him by the state, was, and continues to be a grievous one, when considered in the context of prison life. See *Clutchette,* Slip Opinion, pg. 2. We therefore hold that appellant was entitled to a due process hearing prior to the non-disciplinary change in his custody classification.[1]

It would be inappropriate, in view of the lack of development of the record, to decide and spell out the procedural process due. Upon remand the district court should consider, after further factual development, what procedural requirements must be afforded to meet the exigencies of the situation in light of our holding in *Clutchette II,* and of the Supreme Court in *Wolff.*

It appearing that significant constitutional questions may be involved (no opinion is expressed), the District Court on remand may wish to consider the appointment of competent counsel to assist Lokey in the further prosecution of his claims.

REVERSED and REMANDED for further proceedings consistent with the opinion expressed herein.

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[1]Cf. *Fajerniak v. McGinnis,* 493 F. 2d 468 (9th Cir. 1974).